DAVID GRAMONG

v.

RASIT TAR

HIGH COURT BORNEO, KUCHING
CHONG SIEW FAI J
[ORIGINATING MOTION NO. KG1 OF 1990]
9 JULY 1991

LAND LAW: *Sale and purchase - Power of attorney - Charge - Failure to settle balance of purchase price within stipulated time - Caveat - Removal - Locus standi - Awareness of terms of agreement - Re-negotiations - Whether amounted to repudiation - Supervening events - Land Code (Cap 81) (Sarawak), s. 177(1).*

The applicant and the respondent entered into an agreement on 9 November 1983 whereby the applicant agreed to purchase from the respondent the said lands at RM260,000. Under the agreement, the applicant was required to construct 250 units of double storey concrete terraced houses for the respondent.

Pursuant to Clause 8, the respondent also granted the applicant a power of attorney empowering the latter "full powers" to develop and to deal with the said lands; under Clause 14, time was stated to be of the essence of the agreement.

The deposit of RM10,000 was paid by the applicant; however he failed to settle the balance of the purchase price within the stipulated time. The applicant charged one of the lands to a bank; the respondent subsequently lodged a caveat which was registered on 10 March 1986. The applicant applied for removal of the caveat.

The respondent argued that the applicant could not bring this application under s. 177(1) of the Land Code (Cap) (Sarawak) (the Code) as he (the applicant) was not a registered proprietor of the land in question, nor a person "having a registered estate or interest in the land". The contention was that the power of attorney granted in the applicant's favour merely constituted him an agent for the respondent and did not confer upon him any registered estate or interest in the land. It was also submitted that the applicant had committed a breach of the agreement in that the acts of the respondent in January 1984 claiming unawareness of the terms of the agreement and demanding a review of the deal and entry of a fresh agreement constituted a breach which went to the root of the contract and amounted to repudiation thereof.

Held:

[1] The words "registered interest" include a right, power or privilege validly granted over or in connection with land, at least for the purpose of s. 177(1) of the Code and are broad enough to enable the applicant to make the present application.

[2] It is clear that the respondent's 'breach' or 'repudiation' of the agreement as contended by the applicant, had been overtaken by supervening events and rendered ineffective; and it is not open to the applicant to use it as a ground of complaint due to the conduct of the parties after 18 January 1984 in agreeing to the extensions of time for performing the agreement as shown in the affidavit evidence and the correspondence. There is no evidence that the applicant had instituted any action on the alleged breach. Instead he entered into negotiations with the respondent and more importantly, obtained the grant of extension of time for performing the agreement.

[3] There clearly seems to have been non-compliance of Clause 3(b) of the agreement on the part of the applicant by non-payment of the balance of RM250,000. It was not reasonable for the applicant to hold on to the payment of the balance of RM250,000 pending the outcome of a new agreement or that the sum, if paid, might be "lost".

[4] The respondent was justified in lodging the caveat and keeping it in force as there was no assurance that the applicant would not, despite the default in payment, create further charge or charges upon any of the said lands.

[5] The Court was unable to reasonably conclude that the act of the respondent in lodging the caveat, as he did, signifies unwillingness on his part to be bound by the agreement and amounts to repudiation of the contract, as alleged by the applicant. Nor did the Court agree that the act of lodging the caveat constituted a breach of the agreement as alleged in para. 7 of the applicant's 1st affidavit.

Observation

Order 5 r. 5 of the Rules of the High Court 1980 restricts the former practice of permitting applications for removal of caveats by way of originating motion. Further, s 177 of the Land Code (Sarawak) does not expressly provide that such applications are to be by way of originating motion.

[Applicant's motion dismissed with costs.]

Legislation referred to:
Land Code (Cap 81) (Sarawak), ss. 2, 177(1)
Rules of the High Court 1980, O. 5 r. 5, O. 27 r. 2

For the Applicant - J.M. Chai; M/s. Satem Sagah & Chai, Advocates
For the Respondent - J.C. Fong; M/s. Reddi & Co, Advocates

JUDGMENT

Chong Siew Fai J:

This is an application by the applicant for removal of a caveat dated 26 February 1986 and registered at the Kuching Land Registry Office on 10 March 1986 as Instrument No. L2855/86 so far as affecting one of the four parcels of land against which the caveat was lodged.

The caveat was lodged by the respondent who was at all material times the registered proprietor of the four parcels of land (the said lands).

Altogether the applicant has six affidavits and the respondent, three. They are:

By the applicant:

(i) affidavit affirmed on 16 January 1990 (applicant's 1st affidavit);

(ii) affidavit affirmed on 29 September 1990 (applicant's 2nd affidavit);

(iii) affidavit in reply affirmed on 16 May 1991 (applicant's 3rd affidavit);

(iv) further affidavit in reply affirmed also on 16 May 1991 (applicant's 4th affidavit);

(v) Mr. Wan Junaidi's affidavit affirmed on 16 May 1991 (Mr. Wan Junaidi's affidavit); and

(vi) Mr. Anthony Tai's affidavit affirmed on 16 May 1991 (Mr. Tai's affidavit).

By the respondent:

(i) affidavit affirmed on 27 September 1990 (respondent's 1st affidavit);

(ii) affidavit affirmed on 3 November 1990 (respondent's 2nd affidavit); and

(iii) affidavit affirmed on 7 November 1990 (respondent's 3rd affidavit).

There is also an "Admission of Facts" dated 21 September 1990 made under O. 27 r. 2 by the applicant.

Facts

The applicant and the respondent entered into an agreement dated 9 November 1983 (the agreement) whereby the applicant agreed to purchase from the respondent the said lands at RM260,000 payable as follows:

(i) RM10,000 upon signing of the agreement, which was paid;

(ii) the balance RM250,000, within six months from 9 November 1983 (date of signing of the agreement) when the respondent shall simultaneously effect a transfer of the said lands free from all incumbrances and with vacant possession to the applicant or his nominees (Clause 3(b)).

(For the agreement, see Annexure 'A' in Exh. "B" annexed to the respondent's 1st affidavit).

Clause 4 of the agreement provides:

> In the event that the purchaser shall fail, neglect refuse or is unable to effect the payment of the balance of the cash consideration within the time stipulated in Clause 3(b) hereof, the deposit of RM10,000 shall be forfeited to the vendor as agreed pre-estimated liquidated damages whereupon this agreement shall without more be null and void and both parties shall be discharged of their respective rights and liabilities under this agreement.

Under the agreement the applicant also had to construct 250 units of double-storey concrete terraced houses for the respondent (Clause 2).

By Clause 14, time whenever mentioned was of the essence of the agreement.

Pursuant to Clause 8, the respondent also granted the applicant a power of attorney empowering the latter "full powers to ... develop and to deal with the said lands". The term "deal" under the agreement means transfer, charge, lease or other instrument affecting the interest in the said lands.

It is not disputed that the respondent did not pay the balance RM250,000 which up to the hearing of this motion still remained unpaid.

There is evidence that in January 1984 the respondent claimed the terms of the agreement were not explained to him before he signed and he demanded to review the deal and to "redraw a full and proper development agreement" (see Exh. "WJ2" annexed to the applicant's 2nd affidavit).

There is also evidence from the applicant that "as late as 1985" the parties were still negotiating the terms of a new agreement (see Mr. Tai's affidavit filed on behalf of the applicant). That, however, is the evidence so far as the negotiation in point of time goes.

In para. 12 of the respondent's 2nd affidavit, he deposed that the applicant had asked for extension of time to pay the balance RM250,000 but failed to pay up despite the extension. In support, the respondent produced Exhs. 'A' and 'B' annexed thereto. Exh. 'B' is a photocopy of the letter dated 9 December 1985 requesting for "a further one month extension ... to finalise our agreement". It was written by Messrs. Anthony Tai which was then acting for the applicant. This evidence is not specifically challenged or disputed.

On or about 17 January 1986 the applicant by virtue of the power of attorney granted to him, charged one of the four parcels of land (not the parcel respecting which removal of the caveat is sought in this action) to a bank.

On or about 26 February 1986 the respondent lodged the caveat, (subject matter of this action) which was registered as Instrument L2855/86 on 10 March 1986.

Locus Standi

For the respondent, it was firstly argued that the applicant could not bring this application under s. 177(1) of the Land Code, he not being the registered proprietor of the land in question, nor a person "having a registered estate or interest in the land". The power of attorney granted in the applicant's favour, it was contended, merely constituted him an agent for the respondent (registered land proprietor) and did not confer upon the applicant any registered estate or interest in the land.

Section 177(1) of the Land Code (Cap. 81) provides:

> Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged, may ... apply to the High Court for an order that the caveat be removed.

The word "interest" is not defined in s. 2 of the Land Code.

In the instant case, the applicant is not merely a purchaser under contract but someone armed with a duly registered valid power of attorney conferring upon him wide range of powers including powers to effect dealings (as defined in s. 2 of the Land Code) and to commence prosecute or enforce actions or legal proceedings relating to any matters in connection with the said lands. In my opinion the words "registered interest" include a right, power or privilege validly granted over or in connection with land, at lease for the purpose of the said s. 177(1) are broad enough to enable the applicant to make the present application.

The unreported cases of *Loh Ing Kiong & Anor. v. Chiang Yong Tiong* (Sibu High Court originating motion no. 2 of 1982) and *Chong Vui Chiung @ Chong Kuek Ming v. Bath Pharmacy Sdn. Bhd.* (Kuching High Court originating motion no. KG17 of 1989) cited for the respondent lack the features present in our instant case. In the former suit the applicants were mere purchasers under an agreement, and in the latter case, the plaintiff was a *de bonis non* administrator of a deceased's estate without any registered estate or interest of the landed property involved.

There was allegation of breach of the agreement by each party against the other.

Applicant's Allegation of Breach

For the applicant, it was contended that the acts of the respondent in January 1984 claiming unawareness of the terms of the agreement and demanding a review of the deal and entry of a fresh agreement constituted a breach which went to the root of the contract and amounted to repudiation thereof. (See also paras. 4 and 5 of the applicant's 2nd affidavit where Exhibits "WJ1" dated 21 December 1983 and "WJ2" dated 18 January 1984 were referred to). So far as concerning Exh. "WJ1", it requested for entry of a supplementary agreement under Clause 7 of the agreement which required a schedule to be drawn up. It also expressed the wish to verify "some salient points" in the agreement said to be ambiguous. This need not necessarily indicate a "reluctance to perform" the agreement, and is far from being a breach. As regards the respondent's request to make a fresh agreement, this was rejected by the applicant who insisted performance on the part of the respondent. (See Exh. "AT2" dated 20 January 1984

annexed to the applicant's 2nd affidavit). The letter dated 14 July 1984 (Exh. "AT1") written on behalf of the applicant spoke of extension of time to 31 July 1984 granted by the respondent and indicated the clear intention of the respondent to stick to the agreement.

There is, however, evidence of the parties negotiating for a new sale and purchase agreement in 1985 (see Mr. Wan Junaidi's affidavit). It is not clear when exactly the negotiation sceased. In Mr. Tai's affidavit the negotiations were said to be still continuing "even as late as 1985" - a phrase which is vague and not quite helpful on the point. There is no evidence of the outcome of the negotiations. It appears obvious that the negotiations did not achieve the formation of a new agreement.

The letter dated 9 December 1985 from Messrs. Anthony Tai (then acting for the applicant) shows that there was an extension of one month from that date to finalise the agreement dated 9 November 1983. The extension was described as the final extension. The letter was addressed to the respondent. It reads:

> Encik Rasit bin Tar
> Kampong Sungai Kelantan
> Kuching
>
> Dear Sir
>
> **Re: Lot 88, Block 12, Muara Tebas Land District**
>
> Lot 4305 Muara Tebas Land District
> Lot 4753 Muara Tebas Land District
> Lot 4306 Muara Tebas Land District
>
> We're to refer to our oral discussion on 6 December 1985 (Anthony Tai/Rasit bin Tar) at this office and wish to confirm that you've agreed to grant us a further one month extension from the date hereof to finalise our agreement. This extension is the final extension.
>
> Yours faithfully
>
> Anthony Tai

This final extension would expire on 9 January 1985.

On the evidence, it is, in my judgment, clear that the respondent's "breach" or "repudiation" of the agreement as contended by the applicant, had been overtaken by supervening events and rendered ineffective; and it is not open to the applicant to use it as a ground of complaint because of the conduct of the parties hereto after 18 January 1984 (date of Exh. "WJ2") in agreeing to the extensions of time for performing the agreement as shown in the affidavit evidence and the correspondence referred to above. There is no evidence that the applicant had instituted any action on the alleged breach. Instead, he entered into negotiation with the respondent and, more importantly, obtained, as stated earlier, the grant of extensions of time for performing the agreement.

Respondent's Allegation of Breach

The respondent contended that the applicant had committed a breach of the agreement in that the balance of RM250,000 was never paid (see para. 8 of the respondent's 1st affidavit). There is clear unchallenged evidence that the said balance had not been paid by the applicant despite the extension granted on 6 December 1985 which was the final extension. (See the letter dated 9 December 1985 quoted above). On the evidence there clearly seems to have been non-compliance of Clause 3(b) of the agreement on the part of the applicant by non-payment.

Before going further, I consider it desirable to make clear that this is an action for removal of caveat, and is not one on contract where the rights and obligations of the parties thereunder would be directly in issue. Therefore, whatever comments, remarks or interpretations made in this judgment on the acts, conduct or depositions of the parties or of the deponents involved are solely for the purpose of adjudicating upon the relief sought in this action, based on the evidence as adduced.

Justification for not paying RM250,000 - Indication of applicant repudiating the contract?

For the applicant, Counsel submitted that it was reasonable for the applicant to hold on to the payment of the balance RM250,000 pending the outcome of a new agreement and that the sum, if paid, might be "lost". I reject the contention. The evidence respecting the negotiation being, as stated earlier, vague and lacking in particulars as to time, has hardly any significance on the point raised. On the other hand, there was the final extension of time of one month from 9 December 1985. As regards the submission that the balance, if paid, might be lost, payments are, generally speaking, governed by the terms of the contract involved. In the instant case, the payment was stipulated to be accompanied by a simultaneous transfer of the said lands in favour of the applicant (see Clause 3(b) of the said agreement); and there is no evidence or even allegation that the respondent would not perform his part of the bargain on the extended date for payment.

Points unsupported by evidence

Still on the non-payment of the balance RM250,000. In paras. 5 to 8 (inclusive) of the respondent's 2nd affidavit, the respondent deposed to the effect that after receipt of the letter "AT1" dated 14 July 1984 he had seen Mr. Anthony Tai (then acting for the applicant) on various occasions for payment of the balance RM250,000 but to no avail, and was informed by Mr. Tai that the applicant had not deposited any money with him and that the applicant needed extension of time as he (the applicant) had not deposited with him (Mr. Tai) any money to settle the balance. In para. 5 of the applicant's 3rd affidavit, the applicant merely made a denial, and then referred to Mr. Tai's affidavit. But in Mr. Tai's affidavit there was no denial at all of the respondent's approaching Mr.Tai for payment, nor any denial whatsoever of the respondent's assertion that according to Mr. Tai, the reason for the extension of time was because no money was deposited for payment. The point becomes more significant in the light of the applicant's own statement that he had until 31 July 1984 to deposit the said balance (see para. 2 of the applicant's 3rd affidavit) when the extensions took place not only in 1984 but also in 1985. In this connection, it may also be noted that the qualification in the applicant's "Admission of Facts" dated 21 September 1990 that the balance "was then (that is 14 July 1984) ready for collection however the respondent ... refused to accept the payment and never turned up to collect the same", is not supported by evidence.

For the purpose of this application, I prefer the evidence of the respondent to that of or adduced on behalf of the applicant on the above points.

Lodgment of caveat by respondent - Indication of repudiation of the agreement?

The applicant contended that by lodging the caveat L2855/86, the respondent indicated unwillingness to be bound by the agreement and had repudiated the contract (see paras. 3 and 7 of the applicant's 3rd affidavit). It is a matter of ascertaining whether the act of the respondent is such that, having regard to all the facts and circumstances of the case, it would lead a reasonable person to conclude that he no longer intended to be bound by the provisions of the agreement. The caveat was lodged on or after 26 February 1986 by which

time the final extension of one month from 9 December 1985 had expired and the applicant had failed to pay the balance RM250,000. The statutory declaration made on 26 February 1986 in support of the caveat shows that the caveat was lodged on account of failure on the part of the applicant to pay the balance RM250,000, the need to protect his (respondent's) interest because of the power of attorney granted to the applicant, and the land titles not being in his possession (see Exhibit "B" annexed to the applicant's 1st affidavit). Moreover, the respondent in his evidence expressed apprehension that in view of the power of attorney granted to the applicant, the applicant might, despite the failure to pay the balance RM250,000 under the agreement, further deal with the said lands as he (the applicant) had done by charging one of the parcels, Lot 4753, under Charge Instrument L668/86 of 17 January 1986 (see the respondent's 3rd affidavit and Exhibit "A" annexed thereto). It may be noted that by 17 January 1986, default in the payment of the balance RM250,000 by the extended period had taken place. In his affidavit evidence the applicant said that the charge for RM100,000 of which RM70,000 had been released was "for the purpose of expenses relating and incidental to the proposed project under the sale and purchase agreement dated 9 November 1983 such as legal fees, architect bills, engineers' expenses etc." (Paragraph 2 of the applicant's 4th affidavit). The point of the respondent, as I understand it, is that his caveat was necessary as there was no assurance that the applicant would not, despite the default in payment, create further charge or charges upon any of the said lands (see paras. 10 and 11 of the respondent's 1st affidavit and paras. 2 and 4 of his 3rd affidavit). In my view, the fear of the respondent is not unfounded or unreasonable. From paras. 4 to 8 of the applicant's 1st affidavit, it is clear that the purpose of the application to remove the caveat is to enable the applicant to exercise the powers contained in the power of attorney. The power of attorney was created under the agreement. The applicant had defaulted in the payment of the balance RM250,000. On the facts and circumstances as reflected by the evidence adduced, I am unable to reasonably conclude that the act of the respondent in lodging the caveat, as he did, signifies unwillingness on his part to be bound by the agreement and amounts to repudiation of the contract, as alleged by the applicant. Nor am I able to agree that the act of lodging the caveat constituted a breach of the agreement as alleged in para. 7 of the applicant's 1st affidavit. I find to the contrary. The respondent, in my judgment, was justified in lodging the caveat L2855/1986 and keeping the caveat in force.

As to the building of the 250 terraced houses, there is no dispute that the applicant has not constructed them. In his "Admission of Facts" dated 21 September 1990, the applicant qualified by saying that the respondent's breach prevented him from constructing. No evidence, however, was adduced on the alleged breach. As such, the qualification is a mere allegation devoid of evidential value.

On the evidence and the materials before me, the circumstances, in my judgment, are such that it is just that the caveat lodged by the respondent and registered at the Kuching Land Registry Office on 10 March 1986 as Instrument No. L2855/86 do remain on the relevant Land Register. The motion is dismissed with costs to be taxed, if not agreed, and paid by the applicant to the respondent.

Observation on procedure

Recently there has been, before me, a number of applications for removal of caveats commenced by way of originating motions. I do not think this is any longer the proper procedure. Order 5 r. 5 of the Rules of the High Court 1980 provides:

> Proceedings may be begun by originating motion or petition if, but only if, by these rules or by or under any written law the proceedings in question are required or authorised to be so begun.

a By this rule the former practice of permitting freer use of originating motions has been restricted. Section 177 of the Land Code (Cap. 81) does not expressly provide application to be by originating motion, I am also not aware of any other provision in the Land Code requiring or authorising the use of originating motion for application of the present nature.

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Also found at [1991] 3 CLJ 2143

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